

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-219648

FILE:

DATE: November 5, 1985

Triple D Orchards, Inc.

MATTER OF:

DIGEST:

Telegraphic bid for the supply of canned vegetables, submitted in response to total small business set-aside solicitation, which bid stated with reference to offered prices and delivery schedule "All above subj. to terms and conditions [of solicitation]. 100% American processed . . ." failed to unequivocally represent that bidder would furnish products produced by small business concern and, therefore, properly was rejected as nonresponsive.

Triple D Orchards, Inc., protests the rejection of its telegraphic bid for the supply of canned asparagus as nonresponsive under invitation for bids (IFB) No. DLA13H-85-B-8804, issued as a total small business set-aside by the Defense Logistics Agency, Defense Personnel Support Center, Philadelphia, Pennsylvania (DLA). We deny the protest.

The IFB, issued on May 24, 1985, as a small business set-aside with a price differential for labor surplus area concerns, informed bidders that, in addition to qualifying as a small business, a manufacturer or regular dealer that submits an offer in its own name must agree to provide end items manufactured or produced by small business concerns. In this regard, on page 19 of the IFB appeared the usual Small Business Concern Representation clause. The IFB also incorporated the provisions of Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-13 (1984), which authorized and set forth the requirements for the submission of telegraphic bids.

The telegraphic bid submitted by Triple D was the apparent low bid, but the contracting officer rejected the bid as nonresponsive because it contained no express certification or representation that the bidder was a small business and that it would provide products manufactured or produced by a small business concern.

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Triple D contends that it should have received the contract award since it was the low bidder and its telegraphic bid complied with the requirements of FAR, 48 C.F.R. § 52.214-13. After setting forth the quantities, delivery schedule and prices offered, the protester stated in its telegraphic bid, "All above subj. to terms and conditions issued on 24 May 85, pages 1-28 [referring to the entire solicitation]. 100% American processed confirm to follow in mail 6/25/85." The protester is of the view that this language was sufficient to show its compliance with all of the solicitation's requirements, including its small business status and its intent to furnish supplies produced by a small business.

With relevance to the necessary certification omitted from the protester's telegraphic bid, FAR, 48 C.F.R. § 52.214-13, provides:

"TELEGRAPHIC BIDS

"(b) Telegraphic bids shall . . . include . . . all representations and other information required by this solicitation, and a statement of agreement with all the terms, conditions, and provisions of the invitation for bids.

"(c) Telegraphic bids that fail to furnish required representations or information, or that reject any of the terms, conditions, and provisions of the solicitations, may be excluded from consideration." (Emphasis added.)

It is clear from this provision that in a telegraphic bid, the bidder must include all representations required by the solicitation in addition to a statement of agreement with all terms, conditions, and provisions of the IFB, and that the omission of either required representations or a statement of agreement to the terms, conditions, and provisions may result in rejection of the bid.

In this case, the solicitation required that the bidder, as a part of its bid, represent and certify whether it is a small business concern and whether all supplies to be furnished would be manufactured or produced by a small business concern in the United States, its possessions or Puerto Rico. Although Triple D included a blanket

statement of agreement with the terms of the IFB, it did not include a certification that it was a small business or that it would provide products produced by a small business concern.

Triple D first asserts that its status as a small business concern was established by virtue of the fact that it was provided by DLA with a copy of this solicitation set aside for small business concerns. This is incorrect: copies of solicitations such as this are made available on request, but it is each bidder's obligation to represent in its bid whether it is a small business concern. Triple D's failure to do so, however, would not in itself warrant rejection of its telegraphic bid because information concerning its size status, which does not affect the responsiveness of its bid, may be provided after bid opening. Triple D's failure to certify its size status in a bid on a total small business set-aside, therefore, may be waived as a minor informality. See Extinguisher Service, Inc., B-214354, June 14, 1984, 84-1 C.P.D. ¶ 629.

This is distinguishable from the second portion of the "Small Business Concern Representation" clause, which concerns a matter of responsiveness because it involves an obligation to provide supplies manufactured by a small business concern, a key element of a small business set-aside for supplies. In Ace Metal Fabricators, Inc., B-210265, Mar. 14, 1983, 83-1 C.P.D. ¶ 249, which is directly on point, we held that a telegraphic bid submitted in response to a small business set-aside which failed to indicate the bidder's intention to furnish supplies manufactured by small business firms was nonresponsive, despite the bidder's blanket statement in its bid that it would comply with all terms and conditions of the IFB. Such a bid does not establish an unequivocal commitment, but is at best ambiguous. Since the bidder therefore is free to furnish supplies manufactured by a large business and, thus, defeat the purpose of the set-aside, its bid must be rejected as nonresponsive. See also Mil-Pac, Inc., B-181717, Oct. 8, 1974, 74-2 C.P.D. ¶ 196.

Even though the protester promptly confirmed its telegraphic bid by submitting a formal bid bearing the appropriate certifications, its formal bid, which was received after bid opening, cannot cure the deficiency in the telegraphic bid since a nonresponsive bid cannot be

B-219648

4

made responsive after bid opening. Ace Metal Fabricators, Inc., B-210265, supra, 83-1 C.P.D. ¶ 249 at 3; UWD Manufacturing, Inc., B-195712, Nov. 29, 1979, 79-2 C.P.D. ¶ 380.

The protest is denied.

for Seymour Gross
Harry R. Van Cleve
General Counsel